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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

LEVIN RICHMOND TERMINAL CORPORATION, RICHMOND PACIFIC RAILROAD CORPORATION, AND LEVIN ENTERPRISES, INC.,

Plaintiffs,

v.

CITY OF RICHMOND, CITY COUNCIL OF THE CITY OF RICHMOND, AND DOES 1 TO 100, INCLUSIVE,

Defendants.

AND RELATED CASES.

Case Nos. 4:20-cv-01609-YGR
4:20-cv-01614-YGR
4:20-cv-01643-YGR

NOTICE OF MOTION AND MOTION OF THE STATE OF CALIFORNIA TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANTS' MOTIONS TO DISMISS

Date: July 28, 2020
Time: 2:00 p.m.
Place: Courtroom 1
1301 Clay Street, Oakland, CA

Trial Date: None Set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT the State of California hereby moves the Court for leave to file a single amicus curiae brief in each of the three above- captioned cases in support of Defendants City of Richmond and City Council of the City of Richmond ("City or Richmond"). A copy of the proposed amicus brief is attached as an exhibit to this motion. Richmond has consented to and supports the filing of the amicus brief. Each of the Plaintiffs declined to consent to the filing of the amicus brief.

District courts have wide discretion to grant leave to participate as amicus curiae. *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982) (abrogated on other grounds by *Sandin v. Conner*, 515 U.S. 472 (1995)). This discretion is liberally applied when the legal issues in a case "have potential ramifications beyond the parties directly involved." *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005). The Ninth Circuit has described the "classic role" of an amicus to include "assisting in a case of general public interest." *Funbus Sys., Inc. v. State of Cal. Pub. Utilities Comm'n*., 801 F.2d 1120, 1125 (9th Cir. 1986).

In the absence of specific rules governing amicus appearances at the district court level, district courts may look to the rules governing amicus participation in appellate courts. *See Ass'n of Am. Physicians & Surgeons, Inc. v. Brown*, No. 2:16-cv-02441-MCE-EFB, 2017 WL 4351766, at *2 (E.D. Cal. Sept. 29, 2017) (granting motion for leave to file as amicus curiae pursuant to Fed. R. App. P. 29). In federal appellate courts, states may file amicus curiae briefs as of right. Fed. R. App. P. 29 ("a State may file an amicus-curiae brief without the consent of the parties or leave of court").

The State of California has an interest in both the subject matter and legal implications of the controversy currently before this Court. These cases challenge a locality's ability to use its police power to protect the public health of its most vulnerable citizens. Coal handling can create particulate matter ("PM") from fugitive dust emissions, which can lodge deep in the lungs and is linked to cardiac illness, stroke, respiratory illness and asthma. *See* attached Brief of Amicus Curiae at 2-3. The City of Richmond's Ordinance, "Prohibition of the Storage and Handling of Coal and Petroleum Coke" ("Ordinance"), is a land use regulation intended to protect its at-risk

residents from pollution associated with the storage and handling of coal. The Ordinance phases out coal and petroleum coke handling in Richmond, which occurs near residential low-income communities of color that already face a heavy pollution burden and high rates of asthma and cardiovascular disease, *see id*. at 3, and are therefore designated as "disadvantaged communities" by the California Environmental Protection Agency.[1] Thus, the State seeks to weigh in on this matter of public interest because it has the potential to undermine the State's ability and the ability of its local subdivisions to protect their most vulnerable communities.

In addition, the State has an interest in offering its perspective on the Constitutional and federal preemption issues implicated by the present matters. California has created and implemented many environmental policies and initiatives that face challenges on the grounds of federal preemption and the dormant Commerce Clause. Thus, California has an interest in ensuring that the courts construe the preemption and Commerce Clause doctrines in a consistent manner that will protect the general police powers which reserve the protection of health, safety and the environment to states and municipalities. The State therefore submits the attached brief in order to assist the Court in reviewing the Constitutional and federal preemption issues in these cases in a manner that recognizes the significant State and local interests at stake.

Dated: May 20, 2020

Respectfully Submitted,

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[1] *See* California Office of Health Hazard Assessment's Disadvantaged Communities Map at: https://oehha.ca.gov/calenviroscreen/sb535.

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Amicus Curiae, the State of California, respectfully presents this brief addressing two legal frameworks at issue in the City of Richmond's ("Richmond" or "City") Motion to Dismiss the Complaints in the above-captioned actions: *Levin Richmond Terminal Co. v. City of Richmond*, case no. 4:20-cv-01609-YGR, *Phillips 66 Co. v. City of Richmond*, case no. 4:20-cv-01643, and *Wolverine Fuel Sales, LLC v. City of Richmond*, case no. 4:20-cv-01614-YGR. Plaintiffs to these three actions are collectively referred to as "Plaintiffs."

INTEREST OF AMICUS CURIAE

State and local governments have broad powers to protect the health and safety of their residents and their natural environments. California and its subdivisions are charged with balancing demands for economic growth and development, health and safety concerns, and the need to preserve finite natural resources located within their borders. To this end, "[t]he States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Met. Life Ins. Co. v. Mass.*, 471 U.S. 724, 756 (1985) (internal quotation marks omitted).

The issues presented by this case are of fundamental importance to California and its subdivisions. A decision holding that the Richmond is preempted or otherwise precluded from regulating land uses within its borders, for the protection of its most vulnerable citizens and the environment, would impede California and its subdivisions' ability to fulfill their important police power responsibilities to "protect[] the health, safety, and welfare of [their] citizens." *See United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342-43 (2007). The current public health crisis facing communities highlights the extraordinary importance of those responsibilities, as disadvantaged communities like Richmond that have historically borne the brunt of industrial pollution are faced with a "double-whammy" of health risks from the novel coronavirus. *See* Hiroko Tabuchi, *In the Shadows of America's Smokestacks, Virus is One More Deadly Risk*, N.Y. Times, May 17, 2020.[1]

[1] Contra Costa County, where Richmond is located, has recorded 1,089 coronavirus cases, and its fatality rate is nearly double that of San Francisco, a substantially wealthier community. *Available a*t: https://www.nytimes.com/2020/05/17/climate/pollution-poverty-coronavirus.html

INTRODUCTION

Richmond's zoning ordinance, entitled "Prohibition of the Storage and Handling of Coal and Petroleum Coke" ("Ordinance"), phases out the storage and handling of coal and petroleum coke ("petcoke") within the City. The purpose of the Ordinance is to "protect and promote the health, safety and welfare of the City's citizens, visitors, and workers by reducing the release of pollutants into the environment as a result of coal and petroleum coke storage and handling." The lone facility in the City that currently stores or handles coal or petcoke is the Levin Richmond Terminal ("Terminal"), which handles over a million tons of coal and roughly half a million tons of petcoke per year.

This amicus brief addresses two claims alleged by Plaintiffs, namely that the Ordinance: (1) violates the dormant Commerce Clause; and (2) is preempted by the Interstate Commerce Commission Termination Act ("ICCTA"). *See* Levin Compl. ¶¶ 99-116; Wolverine Compl. ¶¶ 44-49, 56-63; Phillips 66 Compl. ¶¶ 40-48.[2] Neither claim has merit. First, the Ordinance comports with the dormant Commerce Clause because it does not regulate extraterritorially, discriminate against interstate or foreign commerce, or impose an excessive burden on commerce that outweighs its benefits. *See Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986). Second, pursuant to clearly-established caselaw, ICCTA's preemption provision is inapplicable to the Ordinance: the Terminal at which coal and petcoke will no longer be handled is not owned, operated, or controlled in any way by a "rail carrier" providing national (or international) common carrier rail service subject to federal jurisdiction. *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295, 309 (3d Cir. 2004). Thus, the City's ordinance is neither preempted nor constitutionally prohibited. Rather, it is a legitimate, non-discriminatory exercise of authority pursuant to a local government's traditional police power to protect the health and safety of its residents.

[2] The Phillips 66 Complaint does not include a claim of preemption by ICCTA.

BACKGROUND

Two critical facts justified the City's exercise of its police power in this matter. First, the handling of coal can create significant pollution in the form of toxic heavy metals and particulate matter ("PM") from fugitive dust emissions.[3] Particulate matter—a major concern in the Bay Area—can lodge deep in the lungs and is linked to cardiac illness, stroke, respiratory illness and asthma.[4] Scientific experts have not been able to establish a safe threshold for population exposure to PM, and even short-term exposures to PM can cause harm.[5] And the "sizable but highly localized environmental costs" of coal storage and handling "disproportionately impact the economically disadvantaged communities" living near such facilities.[6]

The second critical fact is that the Terminal is located near residential low-income communities of color[7] that have long suffered excessively high impacts from industrial pollution in the East Bay. Richmond's industrial heritage means its citizens have been uniquely and disproportionately exposed to air pollution. The California Environmental Protection Agency has identified various census tracts within the City, including those adjacent to the Terminal, as disadvantaged communities disproportionately burdened by and vulnerable to pollution when considering environmental, health, and socioeconomic factors.[8] For example, asthma rates are extremely high in these communities (higher than 99% of the state), as are low birth weights (87th percentile and above) and cardiovascular disease (80th percentile and above), all of which are

[3] *See* Health Effects of Petroleum Coke, U.S. Environmental Protection Agency, at https://tinyurl.com/tzzxnz4; *see also* April 23, 2019, Richmond City Council Agenda Report at pp. 3-4, available at https://tinyurl.com/y8obhbqv.

[4] Bay Area Air Quality Management District, *Understanding Particulate Matter*, November 2012, at 2-4, available at https://tinyurl.com/ycz5ms29 ("BAAQMD Report") (calling particulate matter "the air pollutant that poses *by far* the greatest health risk to Bay Area residents.") (emphasis in original).

[5] *Id*. at 4-5.

[6] Jha and Muller, *Handle With Care: The Local Air Pollution Costs of Coal Storage* (National Bureau of Economic Research, May 2017), available at https://tinyurl.com/ydy7ajxe.

[7] *See* CalEnviroScreen 3.0 Map, available at: https://tinyurl.com/yxp4hvcw.

[8] *See id*. The neighborhoods near the Terminal experience among the highest pollution burden in the state according to CalEnviroScreen—their exposure to pollution and vulnerability to pollution is worse off than 80-95% of the State of California. *Id.* *See also* California Office of Health Hazard Assessment's Disadvantaged Communities Map at: https://tinyurl.com/tvrrmpt.

linked to pollution exposure.[9] The very heart of municipalities' police powers is to protect the health and welfare of such communities.

ARGUMENT

The California Constitution gives cities and counties broad police powers to "make and enforce within [their] limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Cal. Const., art. XI, § 7. With particular relevance here, the Supreme Court has recognized that "[l]egislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power." *Huron Portland Cement Co. v. City of Detroit, Mich.*, 362 U.S. 440, 442 (1960). Given the well-established negative health and environmental impacts associated with coal storage and handling, and the vulnerability of communities residing near the Terminal, Richmond's decision to adopt the Ordinance falls squarely within that power.

Such exercise of police powers to phase out unwanted land uses shall be upheld so long as the action meets the minimal requirement that it "bear[s] a reasonable relationship to the public welfare" and is not "arbitrary or discriminatory." *Arcadia Dev. Co. v. City of Morgan Hill*, 197 Cal. App. 4th 1526, 1537 (2011). Moreover, "[i]n the exercise of that power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government." *Huron*, *supra*, 362 U.S. at 442. Richmond's sovereign police power to take such actions must therefore be given due weight in any analysis of federal preemption and dormant Commerce Clause claims. While the states have ceded certain of their sovereign powers to the federal government—including, to some extent, their ability to regulate rail and ship operations within their jurisdictions—the discretionary land use authority at issue here is not among the ceded or preempted powers.

[9] California Environmental Protection Agency, *CalEnviroScreen 3.0, Update to the California Communities Environmental Health Screening Tool*, January 2017, at 11, available at https://tinyurl.com/yc3nm7fe.

I. THE ORDINANCE IS A LEGITIMATE EXERCISE OF THE CITY'S POLICE POWER THAT DOES NOT RUN AFOUL OF THE DORMANT COMMERCE CLAUSE.

Despite Plaintiffs' claims, the dormant Commerce Clause does not invalidate every exercise of local power that affects the flow of commerce between states. To the contrary, localities "retain broad power to legislate protection for their citizens in matters of local concern such as public health." *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976) (internal quotations and citations omitted); *see also General Motors Corp. v. Tracy*, 519 U.S. 278, 306 (1997) (noting the Court's "traditional recognition of the need to accommodate state health and safety regulation in applying dormant Commerce Clause principles").

Under the dormant Commerce Clause, the first inquiry is whether state and local laws (1) regulate extraterritorially or (2) discriminate against interstate commerce. *Brown-Forman Distillers Corp.*, *supra*, 476 U.S. at 579. Where a challenged law does not regulate extraterritorially or discriminate against interstate commerce, courts will uphold a state or local law "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). For a challenge pursuant the foreign dormant Commerce Clause, the relevant question is whether the law contravenes specific congressional intent to require national uniformity in trade policy, here the international trade of coal and petcoke. *See Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 324 (1994).

A. The Ordinance Only Regulates Conduct Within the City's Borders.

Plaintiffs misstate modern dormant Commerce Clause jurisprudence by arguing that the Ordinance directly regulates interstate commerce because it allegedly blocks the interstate transportation of coal and petcoke for marine export through the City. *See* Levin Complaint ¶¶ 102-103; Phillips 66 Complaint ¶ 43; Wolverine Complaint ¶ 45. However, laws that regulate extraterritorially are rare; a regulation will only fit into this narrow category if it controls commerce occurring wholly outside the regulating jurisdiction. *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989); *see also Brown-Forman Distillers Corp.*, 476 U.S. at 582-83 (describing direct regulation as one state projecting its legislation into another); *Pharm. Research & Mfrs. of Am. v.*

Walsh, 538 U.S. 644, 669 (2003) ("*Walsh*"). The concern in these rare cases is that a state has reached into another sovereign state to regulate commerce occurring entirely outside the regulating state.

Applying this test, the Supreme Court has found extraterritorial regulation when one state's law controls the terms of a transaction in another state's market. *See*, e.g., *Healy*, 491 U.S. at 337-38 (invalidating Connecticut statute because it had "the practical effect of controlling Massachusetts prices"); *compare Walsh*, 538 U.S. at 669 (rejecting extraterritorial regulation claim where challenged law did not regulate the terms of "any out-of-state transaction"). The Ninth Circuit similarly invalidated a Nevada law that, in practical effect, would have required the National Collegiate Athletic Association to use Nevada procedural rules for enforcement proceedings with no nexus to Nevada. *Nat'l Collegiate Athletic Ass'n v. Miller*, 10 F.3d 633, 639 (9th Cir. 1993); *see also Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1323 (9th Cir. 2015) (en banc) (invalidating provision of state law because it regulated commercial transactions taking place wholly outside the state's borders).

In contrast, the Ordinance being challenged here only prohibits the handling and storage of coal and petcoke within City limits, and does not control any commerce occurring wholly outside Richmond's or California's borders. Thus, by definition, this is not extraterritorial regulation. *See Sam Francis Found.*, 784 F.3d at 1324 (discussing several cases finding *no* extraterritorial regulation where laws regulated "*in-state conduct* with allegedly significant out-of-state practical effects") (emphasis in original); *see also Pharm. Research & Mfrs. of Am. v. Cnty. of Alameda*, 768 F.3d 1037, 1043 (9th Cir. 2014) (rejecting extraterritorial regulation claim where challenged ordinance imposed no requirements on actions outside the regulating county).

B. The Ordinance Does Not Discriminate Against Interstate Commerce

Laws that discriminate under the Commerce Clause are those "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Dep't. of Dep't. of Rev. of Ky. v. Davis*, 553 U.S. 328, 337-38 (2008). Such laws constitute "simple economic protectionism" and thus are invalid unless they can pass a form of strict scrutiny. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). When determining whether a law

imposes prohibited discriminatory treatment on out-of-state businesses, courts must compare the law's impact on "substantially similar entities," meaning entities that engage in "actual or prospective competition…in a single market." *General Motors Corp.*, 519 U.S. at 298, 300.

The City's Ordinance does not discriminate against outside interests in favor of substantially similar competing local interests. The Ordinance regulates the handling of certain substances (coal and petcoke) within the City equally, regardless of where those substances originate. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471-72 (1981) (upholding state statute banning plastic milk containers because law applied "without regard to whether the milk, the containers, or the sellers are from outside the State"). This fact is demonstrated most simply by the very parties challenging the Ordinance: Phillips 66, who ships petcoke through the Terminal from its nearby California refinery, and Wolverine, who ships coal from out-of-state sources. The Ordinance bans the handling of coal or petcoke originating from within California at the nearby Phillips 66 refinery in precisely the same way it does so for coal or petcoke originating from Wolverine's out-of-state facilities. More generally, the Ordinance regulates the handling and storage of coal and petcoke evenhandedly, applying identically to all in-state and out-of-state companies operating in the City. Thus, a California company seeking to handle or store coal or petcoke is limited in the same manner as any out-of-state company seeking to do the same. This is simply not discrimination under the dormant Commerce Clause. *See, e.g., Cnty. of Alameda*, 768 F.3d at 1041 ("[A law] that treats all private companies exactly the same does not discriminate against interstate commerce ….").

C. The Ordinance Does Not Unduly Burden Interstate Commerce.

Where, as here, a challenged law does not regulate extraterritorially or discriminate against interstate commerce, courts apply the deferential balancing test articulated by the U.S. Supreme Court in *Pike*, 397 U.S. at 142. Under the *Pike* test, a state or local law "will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Id.* This "clearly excessive" standard is a high threshold to meet. The Ninth Circuit has found that, to surmount the *Pike* test, "the burdens of the statute must so outweigh the putative benefits as to make the statute unreasonable or irrational." *Alaska Airlines, Inc. v. City of*

Long Beach, 951 F.2d 977, 983 (9th Cir. 1991). As a result of this high burden, courts have invalidated laws under *Pike* in only a "small number" of cases. *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1148 (9th Cir. 2012).

As a threshold matter, Plaintiffs have failed to allege a substantial burden on interstate commerce relevant to the *Pike* analysis, and their claims should be dismissed. Plaintiffs allege that the Ordinance will prohibit the storage and handling of of coal and petcoke at the Terminal, requiring them to seek other transloading options outside of Richmond. *See* Levin Compl. ¶¶ 103-104; Wolverine Compl. ¶¶ 45, 56-63; Phillips 66 Compl. ¶¶ 44-46. But an alleged impact on private companies' operations does not constitute a substantial burden on commerce under *Pike*. The Commerce Clause neither protects Plaintiffs' preferred "method of operation" nor protects against the fact that a government regulation may increase the cost of doing business. *See Exxon Corp. v. Governor of Md*., 437 U.S. 117, 128 (1978). Instead, as the Ninth Circuit has recognized, the court considers whether a law interferes with a need for nationally uniform regulation and whether the law is discriminatory. *See Nat'l Ass'n of Optometrists & Opticians*, 682 F.3d at 1153; *Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1147 (9th Cir. 2015). Accordingly, rules that impose different standards on the instrumentalities of interstate transportation in one particular location have been found to improperly impede interstate commerce and violate the dormant Commerce Clause. *See Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 447–48 (1978) (state regulation of truck length prohibited); *Bibb v. Navajo Freight Lines, Inc*., 359 U.S. 520, 523–24 (1959) (state requirement that trucks travelling in state use a certain type of fender mudguards unconstitutional). Here, on the other hand, the Ordinance does not regulate trucks, trains, or other forms of transportation travelling through the City. Because the Ordinance is neither discriminatory nor interferes with an area in which national uniformity is necessary, there is simply no substantial burden on interstate commerce. Accordingly, this Court need not even consider the benefits here because Plaintiffs have failed to allege the significant burden on commerce that would trigger that inquiry. *Nat'l Ass'n of Optometrists & Opticians*, 682 F.3d at 1155. Plaintiffs' claims of excessive burden fail at the threshold stage.

Even if Plaintiffs had adequately pleaded a substantial burden, the City's interest here in

protecting its most vulnerable residents from pollution is strong. The Ninth Circuit has held that "protection of our environment has repeatedly been recognized as a legitimate and important state interest," acknowledging the "especially powerful interest in controlling the harmful effects of air pollution." *Pac. Merch. Shipping Ass'n v. Goldstene*, 639 F.3d 1154, 1180–81 (9th Cir. 2011). Consistent with this presumption of validity, the Ninth Circuit has repeatedly rejected arguments that health and safety regulations unduly burden interstate commerce. *See, e.g., Yakima Valley Mem'l Hosp. v. Washington State Dep't of Health*, 731 F.3d 843, 848 (9th Cir. 2013) (upholding regulations that "are predicated on a safety-related purpose"); *Union Pac. R. Co. v. California Pub. Utilities Comm'n*, 346 F.3d 851, 872 (9th Cir. 2003) (upholding regulations where the state's legitimate interest was "even minimally" furthered); *Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391, 399 (9th Cir. 1995) (upholding regulatory scheme with goal of "protecting the health and safety of Washington residents").

The incidental burden alleged by Plaintiffs—their inability to unload two particular materials (coal and petcoke) in the City—is not "clearly excessive" as compared to the Ordinance's local benefits. The Ordinance is limited to prohibiting the handling and storing coal and petcoke, thus preventing further public harms associated with those practices and allows other interstate commerce to continue unaffected. Thus, the Ordinance is an example of a city properly exercising its police power for precisely the reason this power exists: to protect the safety and well-being of its residents. In this context, courts are "not inclined to second-guess the empirical judgments of lawmakers concerning the utility of legislation." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 92 (1987) (internal quotations omitted); *see also Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 449 (1978). The Ordinance does not violate the dormant Commerce Clause and should be upheld.

D. The Ordinance Does Not Regulate Foreign Commerce.

Plaintiffs also allege that the Ordinance violates the foreign dormant Commerce Clause, which "limit[s] the power of state governments to act in ways that threaten the federal union's interest in uniform trade policies." *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 404 (3d Cir. 1987) (citing *Wardair Canada, Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1 (1986)). A challenged

action only violates the Foreign Commerce Clause if it contravenes "specific indications of congressional intent" to require national uniformity in trade policy. *Barclays Bank.*, 512 U.S. at 324 (quoting *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 196 (1983)).

Plaintiffs do not, and cannot, allege that Congress has any specific national policy requiring uniformity in the trade of coal or petcoke, and on that basis their claim fails. Moreover, even if Plaintiffs could demonstrate any such intent, the Ordinance could not be said to contravene any such intent because it in no way regulates commerce with foreign entities. The City is neither prohibiting the sale of coal or petcoke in foreign markets nor forbidding foreign nations from purchasing coal or petcoke. Rather, the City is merely prohibiting certain actions at an industrial facility located within its jurisdiction to prevent local pollution. The City is not manipulating foreign trade by placing a quota, tariff, or embargo on products for its own economic benefit. *See South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984) (Alaska law requiring wood be processed by in-state companies prior to export violated foreign dormant Commerce Clause). The City is also not subjecting a foreign or multinational entity to in-state taxes. *See Japan Line*, *Ltd. v. County of Los Angeles*, 441 U.S. 434, 444-55 (1979) (Los Angeles tax applied to foreign-owned shipping containers violated foreign dormant Commerce Clause). While the City's exercise of its police power authority may or may not impact Plaintiffs' profitability, as virtually *all* public health and safety protections *might* impact a company's profitability, such an effect is not a constitutional violation.

II. THE ORDINANCE IS NOT PREEMPTED BY ICCTA.

ICCTA grants the federal Surface Transportation Board (STB) jurisdiction over "transportation by rail carrier" that is conducted "only by railroad" or if it is "by railroad and water, when the transportation is under common control, management or arrangement for continuous carriage or shipment." 49 U.S.C. 10501(a)(1). Section 10501(a)(2) limits the STB's jurisdiction over "transportation by a rail carrier" to interstate rail lines and rail lines travelling between the United States and foreign nations. 49. U.S.C. 10501(a)(2). ICCTA's grant of jurisdiction to the STB over such "transportation by rail carriers" and the construction of rail tracks and facilities is "exclusive." 49 U.S.C. § 10501(b). However, the statute's focus on "rail

carriers" engaged in the national common carrier rail transportation network is critical; ICCTA preempts only state laws that may reasonably be said to have the effect of managing or governing rail carriers engaged in such common carrier rail service, but does not preempt state laws that have "a more remote or incidental effect on rail transportation." *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001).

A. The Ordinance Is Not Preempted Because the Terminal's Operations Do Not Constitute "Transportation by a Rail Carrier."

Plaintiffs' ICCTA preemption claims fail for a simple reason: activities at the Terminal at which the handling of coal and petcoke will be phased out are not "transportation by rail carrier" pursuant to STB authorization. Plaintiffs ask this court to ignore the well-established test for ICCTA preemption articulated by both the Ninth Circuit and the STB. "In order for federal preemption to apply under the ICCTA, the activity in question must first fall within the statutory grant of jurisdiction to the [STB]." *Oregon Coast Scenic R.R., LLC v. Oregon Dep't of State Lands*, 841 F.3d 1069, 1072 (9th Cir. 2016). Plaintiffs' ICCTA preemption claims fail this threshold test: the STB does not have jurisdiction over the Terminal because it is not part of our national common carrier rail transportation network and its activities do not constitute "transportation by rail carrier." 49 U.S.C. 10501(a)(1).

The Terminal is not operated, owned, or controlled in any manner by a rail carrier engaged in "transportation by rail carrier," and therefore, pursuant to 49 U.S.C. 10501(a)(1), the STB has no jurisdiction over the Terminal. Plaintiffs allege no permit or other STB-authorization for the Terminal's operations, because none exist. Because it is not subject to STB jurisdiction, any impact on the Terminal due to the Ordinance is irrelevant for purpose of ICCTA preemption. And because the Ordinance explicitly does not apply to transportation of coal or petcoke by, for example, marine vessel or train, and thus does not apply to any rail carrier operations authorized by the STB, Plaintiffs' ICCTA preemption claims fail under well-settled doctrine.

Moreover, Plaintiffs' claim, taken to its logical conclusion, would mean that the Terminal operates in a legal black hole outside the regulatory scope of any federal, state, or local entity. Courts across the nation and the STB have repeatedly rejected such a nonsensical result. ICCTA

preemption simply does not apply to the Terminal's operations, regardless of whether transportation by a rail carrier is used up to the point that the materials arrive or depart from the Terminal. In *Hi Tech*, the Third Circuit rejected an argument similar to the one here. 382 F.3d at 308–09. There, a solid waste transloading facility entered into a license agreement with a rail carrier to deliver waste, and then argued that ICCTA preempted state police power authority over its facilities. The *Hi Tech* court rejected the preemption claim, recognizing that if "Hi Tech's reasoning is accepted, any nonrail carrier's operations would come under the exclusive jurisdiction of the STB if, at some point in a chain of distribution, it handles products that are eventually shipped by rail by a rail carrier." *Id*. at 309. The court determined that "[t]he mere fact that the [rail carrier] ultimately uses rail cars to transport the… debris Hi Tech loads does not morph Hi Tech's activities into 'transportation by rail carrier'" subject to STB jurisdiction. *Id.*

Other courts and the STB have also refused to recognize ICCTA preemption where a transloading facility was operated by a non-rail carrier not engaged in common carrier service. *See Fla. E. Coast Ry. Co.*, 266 F.3d at 1332–36 (construction-aggregate distribution center, operated by a non-rail carrier lessee of railway property, did not constitute rail transportation and was not governed by the ICCTA); *New York & Atl. Ry. Co. v. Surface Transp. Bd*., 635 F.3d 66, 73 (2d Cir. 2011) (waste-transfer facility, operated by a non-rail carrier that was not acting as an agent for any rail carrier, did not constitute rail transportation and was not governed by the ICCTA); *SEA-3, Inc. – Petition for Declaratory Order*, 2015 WL 1215490, at *4, STB FD No. 35835 (STB served Mar. 17, 2015) ("[T]o be subject to the Board's jurisdiction and qualify for federal preemption under 49 U.S.C. § 10501(b), the activities at issue must be 'transportation' and must be performed by, or under the auspices of, a 'rail carrier.'"); *Valero Refining Company—Petition for Declaratory Order*, FD 36036, 2016 WL 5904757, at *4 (STB Sept. 20, 2016) (transloading facility and railroad tracks operated by non rail carrier was not subject to STB jurisdiction or preemption).

The same is true here. Like the Terminal, hundreds of thousands of entities throughout the State of California contract with rail carriers to have products delivered by rail. To transform these entities into "rail carriers," and to then prevent state and local entities from exercising their

police powers to protect health and safety, ignores the intent of Congress in enacting ICCTA, which was to preempt state law remedies that would have the effect of managing or governing rail transportation regulated and authorized by the STB, not the states' traditional exercise of police power.

B. The Ordinance Does Not Unreasonably Interfere with Rail Transportation.

Because the Terminal is not subject to STB jurisdiction, for the purposes of ICCTA preemption, the relevant inquiry is not the Ordinance's impact on the Terminal itself, but whether the Ordinance impermissibly interferes with STB-authorized operations by rail carriers. In other words, the only operations relevant for the purpose of ICCTA preemption are those of the rail carriers that are subject to exclusive STB-jurisdiction: (1) Union Pacific Railroad Company (UPRR), the Class I interstate rail carrier that delivers coal by rail from Utah mines to Richmond; and (2) the Richmond Pacific Railroad Corporation (RPRC), the Class III short-line railroad that delivers coal from UPRR's main line to the Terminal.[10]

Focusing on the operations of rail carriers, courts have interpreted the plain language of ICCTA to categorically preempt state or local laws that operate either: 1) to deny a railroad the ability to conduct its operations or proceed with activities the STB has authorized; or 2) to regulate matters directly regulated by the STB, including the construction, operation, and abandonment of rail lines. 49 U.S.C. § 10501(b); *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 332 (5th Cir. 2008). State actions that do not fall into one of these categories may be preempted "as-applied" only when they would have the effect of preventing or unreasonably interfering with transportation by rail carriers. *Id.* Courts have declined to find preemption of state laws protecting public health and safety when those laws "are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions." *N.Y. Susquehanna & W. Ry. Corp v. Jackson*, 500 F.3d 238, 253-54 (3d Cir. 2007) (citing *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005)).

[10] RPRC is a Plaintiff to this action, but UPRR is not.

The Ordinance meets these standards. It is a public health and safety measure intended to protect residents from increases of harmful air pollution from coal and petcoke. The requirements of the Ordinance are settled and defined, can be easily obeyed, and do not require the exercise of discretion. Under the Ordinance, railroads (and other forms of transportation) may continue to operate as they always have: they can carry coal, run coal trains through Richmond, and even stop coal trains in Richmond or other locations. Thus, the Ordinance does not unreasonably interfere with the operation of rail carriers and is not preempted as applied.

Plaintiffs' efforts to establish that the City's Ordinance has the effect of managing or governing rail operations fall flat. Wolverine alleges, for example, that "[t]he Ordinance's prohibition of storage and handling of coal at [the Terminal] affects [UPRR]'s rail operations by requiring Wolverine to transport its coal to a more distant marine Terminal for shipment to Japan." Wolverine Complaint ¶ 61. Wolverine further claims that "[t]he Ordinance's prohibition of storage and handling of coal at [the Terminal] also affects RPRC's rail operations, approximately 50 percent of which involve transport of coal." *Id*. All that such allegations might establish is that the Ordinance may have an adverse impact on some prospective economic advantage that might result from demand for rail carrier services, but that does not transform the City's actions into "regulation" or "management" of rail operations. *See Fla. E. Coast Ry. Co.*, 266 F.3d at 1331 (no "regulation" where statute "alters the incentives, but does not dictate the choices" of the federally regulated entity) (citing *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr. N.A.*, 519 U.S. 316, 334 (1997)). Such an impact is, at most, "a more remote or incidental effect" that does not trigger preemption. *Id*. at 1331; *see also Town of Milford, Ma*, STB FD 34444, 2004 WL 1802301, at *3 (Aug. 11, 2004) (where rail carrier's involvement ended when it delivered loaded rail cars to the offloading facility, the facility's "planned activities would not be considered integrally related to … rail carrier service."). Plaintiffs' allegations are therefore insufficient to establish that the Ordinance's prohibition on the handling of coal at an offloading facility, over which no rail carrier will have operational or ownership control, has the effect of "managing or governing" STB-authorized rail operations. Thus, the Ordinance is not preempted by ICCTA.

CONCLUSION

Richmond's Ordinance is a narrow ban on the storage and handling of coal and petcoke in the City. It is the City's response to the plight of its residents who are unfairly burdened by industrial pollution. The Ordinance is a proper exercise of Richmond's police powers and is not preempted by federal law or barred by the Constitution and should be upheld by the Court.

Dated: May 20, 2020

Respectfully Submitted,

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

LEVIN RICHMOND TERMINAL CORPORATION, RICHMOND PACIFIC RAILROAD CORPORATION, AND LEVIN ENTERPRISES, INC., Plaintiffs, **v.** **CITY OF RICHMOND, CITY COUNCIL OF THE CITY OF RICHMOND, AND DOES 1 TO 100, INCLUSIVE,** Defendants. ***AND RELATED CASES.***	Case Nos. 4:20-cv-01609-YGR 4:20-cv-01614-YGR 4:20-cv-01643-YGR **[PROPOSED] ORDER GRANTING MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE THE STATE OF CALIFORNIA** Date: July 28, 2020 Time: 2:00 p.m. Place: Courtroom 1 1301 Clay Street, Oakland, CA Trial Date: None Set

Before the Court is the Motion to file an amicus curiae brief by the State of California in support of Defendants City of Richmond and City Council of the City of Richmond's Motions to Dismiss, in each of the three above-captioned cases.

Having considered the pleadings and good cause appearing, the above-listed amici's Motion is hereby GRANTED and it is hereby ORDERED that the brief attached to that Motion shall be deemed filed in the following cases: Case Nos. 4:20-cv-01609-YGR, 4:20-cv-01614-YGR, 4:20-cv-01643-YGR.

IT IS SO ORDERED.

Dated: _____ By: _____
Honorable Yvonne Gonzales Rogers
United States District Court Judge

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